90-198

No. ~~90-108~~

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANNE ANDERSON, ET AL.,
PETITIONERS,

v.

BEATRICE FOODS CO.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming the discretion of the district judge who, after a long trial and a lengthy factual inquiry, (a) denied a motion to vacate judgment, finding that a new trial would be "pointless, wasteful and unwarranted" and (b) imposed sanctions on petitioners under Fed.R.Civ.P. 11 for prosecuting and maintaining a baseless claim "purely for forensic advantage."

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In addition to the opinions reproduced in Petitioners' Appendix ("P.A."), the District Court's "Memorandum and Order on Beatrice's Motion for Immediate Entry of Final Judgment," the Judgment for Beatrice, and the Court of Appeals Order of January 30, 1990 are relevant and are reproduced as respondent's appendix ("R.A.") to this brief.

COUNTERSTATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the petitioners' misstatement of the facts and the record obliges the respondent to present this counterstatement of the case.

Prior Proceedings and Factual Background — In December 1978 Beatrice acquired two parcels of property in a heavily industrialized area of Woburn, Massachusetts. The property was purchased from John J. Riley Company and consisted of a 15 acre parcel of vacant land (the "15 acres") and an operating tannery on a separate parcel to the southwest (the "tannery site"). Bordering the 15 acres on the east was the Aberjona River. In 1983, as part of a general business plan "to divest itself of its unprofitable smaller businesses" (P.A.49a), Beatrice resold the 15 acres and the tannery site back to John J. Riley Company (referred to as "Rileyco" by the Court of Appeals) and another entity (P.A.4a).

In 1982, petitioners sued W.R. Grace and Beatrice alleging that two city wells closed in 1979 had been contaminated by specific chemicals ("complaint chemicals") and that petitioners had been injured. The wells were located across the Aberjona River on the other side from the 15 acres. W.R. Grace's manufacturing facilities were on the same side of the Aberjona River as the city wells.

After an extraordinarily complex and frenetic discovery period in which hundreds of depositions were taken and thousands of documents exchanged, trial was set for February 1986. The case was trifurcated, with the first phase involving the dispositive issue whether either defendant was responsible for disposal of complaint chemicals, and if so, whether the complaint chemicals had contaminated any groundwater which migrated to the wells. During the 78-day trial which followed, petitioners failed to show disposal of complaint chemicals by Beatrice on the 15 acres and migration of such chemicals from the 15 acres under the Aberjona River to the wells. Petitioners also failed to show that there had been any disposal of complaint chemicals at the tannery site (P.A.83a)

or that certain material found on the 15 acres was tannery waste (P.A.82a-83a).

The jury's answers to Special Interrogatories rejected the petitioners' claim against Beatrice but found against W.R. Grace (P.A.6a). Beatrice moved for entry of judgment (R.A. 2). Pursuant to Fed.R.Civ.P. 49(a), the trial judge later made the dispositive factual finding that petitioners had failed to show that groundwater containing any complaint chemicals had reached the town wells from the 15 acres. Further, the trial judge stated that Beatrice had been entitled to a directed verdict because there was no evidence of disposal of complaint chemicals before the wells closed. (R.A. 6). Judgment was entered for Beatrice (R.A. 8), and the petitioners appealed.

During the pendency of the appeal, a 1983 report came to the petitioners' attention after it was filed with the EPA by Rileyco counsel. The report belonged to John J. Riley Company and had been commissioned by it without Beatrice's knowledge (P.A.53a). In early 1986 the report was not produced by Rileyco's counsel at a deposition pursuant to her claim of privilege and work product (P.A.54a,64a). At that time, the report had been briefly seen by Beatrice's counsel and was not considered significant. In addition, its production was considered to be Rileyco's, not Beatrice's, responsibility because of an understanding of all counsel that Rileyco and Beatrice each would produce their own documents (P.A.48a, 49a;132a-142a). In fact Beatrice produced its own documents including "a huge volume of potentially inculpatory information" (P.A.49a; 69a).

Based on the non-production of the report, petitioners moved to vacate the judgment under Fed.R.Civ.P. 60(b) (P.A.74a). The trial judge held a hearing in late 1987 and thereafter denied the motion, finding that the report would not have made any difference in the outcome of the case, that the report was more favorable to Beatrice than to the petitioners, and that its nondisclosure had not prevented petitioners from fully and fairly presenting their case (P.A.46a,59a,62a,71a,74a). The trial judge rejected any

claim of fraud, conspiracy or fraudulent suppression by Beatrice or its counsel (P.A.69a).

The trial judge also ruled that the 1983 resale agreement between Beatrice and Rileyco had imposed an obligation on Beatrice to inquire about Rileyco documents (P.A.68a-69a). This obligation had not been apparent to, or asserted by, the parties during the discovery period preceding the 1986 trial (P.A.69a). The trial judge later acknowledged that his 1988 ruling was the first "authoritative interpretation of the discovery obligations arising under [the resale] agreement" (P.A. 49a). Based on this interpretation, Beatrice's counsel was found to have committed a lapse of judgment, caused in part by the chaotic pretrial discovery frenzy, counsel's fleeting contact with the report, its apparently minor nature, and counsel's good faith understanding that Rileyco's documents would be produced by its counsel, not Beatrice (P.A.69a; see also P.A.46a).

The petitioners appealed the trial judge's denial of their motion to vacate (P.A.74a). That appeal, and the appeal from the judgment for Beatrice on the merits (based on the jury's answer to Special Interrogatories and the trial judge's factual finding under Rule 49(a)) were consolidated.

Appeals Of The Jury Verdict And Motion To Vacate Judgment — On appeal, the Court of Appeals affirmed the jury's verdict and the district judge's Rule 49(a) finding that no groundwater reached the city wells from the 15 acres. The Court of Appeals held that petitioners had no claim that complaint chemicals reached the wells from the 15 acres (P.A. 21a), and that any failure to produce the report could not have interfered with such a claim (P.A.40a). The appeal on the merits was denied and dismissed (P.A. 44a). However, as to the motion to vacate, jurisdiction was retained and the matter remanded the case to the district judge for a special factual inquiry whether the nondisclosure of the report had substantially interfered with a possible claim based on disposal of complaint chemicals at the tannery site (the "tannery case") (P.A.42a-44a).

The Court of Appeals also set guidelines for weighing the effect of the nondisclosure of the report. Noting that "lack of access to *any* discoverable material forecloses 'full' preparation for trial" (P.A.26a), the Court of Appeals articulated a "gloss" or "refinement" that the nondisclosure should "substantially" interfere with petitioners' case (P.A.26a-27a). Such articulation was an application of the basic principle of Rule 60(b)(3) that the extraordinary relief of vacating a judgment should only be granted where substantial rights were prejudiced (P.A. 25a-27a).

Under the procedural guidelines set by the Court of Appeals, the district judge was first to determine whether the nondisclosure had been deliberate (versus accidental) (P.A. 29a-30a,42a). If deliberate, the petitioners were to be accorded a presumption that there had been substantial interference which the defendant would have the burden of rebutting by clear and convincing evidence (P.A.30a-31a,42a).

Remand Inquiry — "Misconduct" Hearing — On remand, the district judge held a full evidentiary hearing in two phases on the issues of "misconduct" and "interference". After the "misconduct" phase in January-March 1989, the judge issued his findings that there had been no concealment or suppression of evidence and no intentional withholding of information by Beatrice or its counsel (P.A.48a-49a). The trial judge rejected the petitioners' sweeping accusations of fraud, and found that Beatrice had not engaged in any conspiracy to conceal or suppress the report (P.A.49a-52a).

As had been the case at trial, the trial judge once again found that certain material on the 15 acres, which petitioners claimed was tannery waste, had not come from the tannery and was not tannery waste (P.A.51a,52a). He found that no tannery waste had been found on, or removed from, the 15 acres (P.A.51a, 82a-83a) a factual finding petitioners refuse to accept and continue to improperly contest in their Petition.

During the "misconduct" phase of the remand inquiry, Beatrice's counsel took the stand and testified fully about their knowledge of, and contacts with, the report. The trial judge,

who observed the witnesses and who was intimately familiar with the case, fully credited the testimony of Beatrice's counsel (P.A.48a-49a). Despite petitioners' representations made earlier to the Court of Appeals about the alleged prejudice caused them by the prior lack of opportunity to inquire of Beatrice and Rileyco counsel (P.A.37a-39a), petitioners did not cross-examine Beatrice's chief trial counsel and did not call Rileyco's counsel as a witness (P.A.48a).

In his July 1989 "Findings on Remand," the district judge found "deliberate misconduct" by John J. Riley with respect to his deposition and trial testimony about the report and by Rileyco's counsel with respect to the non-production of the report at a Rileyco deposition (P.A.54a,55a). Although the trial judge also found that Beatrice's counsel had not engaged in any deliberate misconduct concerning the report, he nonetheless attributed the conduct of Riley and Rileyco's counsel (both non-parties) to Beatrice. This attribution was not based on agency or privity principles, but solely on the view that the activities of Riley, Riley's counsel and Beatrice's counsel were "functionally synergistic" (P.A.53a).

On the basis of this attribution, and in accordance with the directions of the Court of Appeals on the procedural effect of a finding of "deliberate misconduct," the district judge accorded the petitioners the favorable presumption that there had been substantial interference with a tannery case and imposed on Beatrice the burden of rebutting that presumption by clear and convincing evidence (P.A.75a).

"Interference" Phase of Remand Inquiry — The district judge properly recognized that the issue of substantial interference with an alleged tannery case depended on whether the tannery had disposed of complaint chemicals which had contaminated the tannery site (P.A.93a,97a). He advised the parties that he intended to appoint, at Beatrice's sole expense, a neutral expert to fully test the tannery site and determine whether there had been contamination caused by the disposal of complaint chemicals (P.A.94a). The trial judge stated that

if the expert found such contamination, a finding of substantial interference would almost certainly follow (P.A.94a). Beatrice immediately agreed with the court's proposal for testing (Remand Inquiry Transcript ("Tr.") 7/14/89 pp. 4-5.)

Although petitioners had always complained that they had been denied testing at the tannery site, and "wanted to learn the truth about the tannery" (P.A.101a), they nonetheless strongly opposed neutral testing and vigorously sought to prevent it, refusing to submit or select names of experts (P.A.95a) and later attacking the integrity of the expert the court selected (P.A.100a,101a). The district judge noted that this opposition contrasted with the petitioners' previous protestations (P.A.101a). Ultimately, the testing by the neutral expert was cancelled because of its unanticipated duration and expense (P.A.76a), but, as the district judge noted, it likely would have been carried out had the petitioners not opposed it (Tr. 9/1/89 pp. 13-14, 20-21; P.A.100a-101a).

At the "interference" phase of the hearing Beatrice made a request for limited discovery about the petitioners' alleged tannery case. This resulted in petitioners identifying an investigative file (P.A.77a) which included reports by investigators who had conducted scores of interviews in a "thorough and well documented inquiry" (P.A.82a) into the tannery's alleged use or disposal of chemicals (P.A.81a). The court found the investigative file to be material to the basic issue of alleged interference and ordered it produced (P.A. 76a-77a). As a protection to the petitioners, the file was received *in camera*, and never shown to Beatrice's counsel (P.A.77a-78a).

Inasmuch as petitioners had been given the benefit of a favorable presumption of interference with an alleged tannery case, Beatrice called petitioners' counsel (or a designee) as a witness to demonstrate the lack of such interference (Tr. 10/17/89 p. 77). Unlike Beatrice's counsel, both of whom had voluntarily taken the stand at the "misconduct" phase of the hearings, petitioners' counsel, when faced with being questioned

about the alleged interference with a tannery case, refused to take the stand (Tr. 10/16/89 pp. 71-73). The District Court strongly suggested the likely importance of the petitioners' counsel's testimony, but did not compel it (Tr. 10/16/89, pp. 73-76; Tr. 10/17/89, pp. 77-78). That testimony would have revealed the petitioners' pre-trial knowledge that the tannery had not disposed of complaint chemicals (P.A.80a-84a), just as the neutral testing at the tannery, which the petitioners also strongly opposed, would have revealed that the tannery was not a source of contamination by complaint chemicals (See P.A.83a; 87a-89a).

Despite petitioners' counsel's refusal to testify and petitioners' opposition to testing, Beatrice introduced extensive documentary evidence at the "interference" phase of the hearing, including the report itself, showing that there had been no substantial interference with any tannery case (Remand Inquiry Exhibits "D.Exhs." 2000-2115; P.A.77a). Moreover, as had been demonstrated both at the earlier trial and during the first phase of the remand inquiry, the immutable fact remained that there had been no disposal of complaint chemicals at the tannery site (P.A.83a, 51a-52a). In addition, Beatrice provided evidence of testing in 1986 by a third party which had found no contamination of the tannery site by complaint chemicals (See D. Exhs. 2073, 2074; P.A.78a).

Throughout the "misconduct" phase of the remand inquiry, the district court heard and denied numerous unfounded motions constantly accusing Beatrice and its counsel of fraud, misrepresentation, concealment and misconduct and seeking drastic sanctions (See e.g. P.A.97a-99a, 91a). At the "interference" phase of the hearing, petitioners continued these tactics, and filed a new series of motions echoing the same themes. This time the motions were based on affidavits which had accompanied a motion filed by counsel for Rileyco in October 1989 unsuccessfully seeking reconsideration of the district judge's "deliberate misconduct" finding (P.A.163a-176a). Beatrice filed a detailed opposition to the petitioners' new

motions together with affidavits controverting the petitioners' accusations (P.A. 177a-192a). At the close of the remand inquiry the district judge held a full hearing on these motions and fully considered all affidavits and all of petitioners' claims and objections including the accusations of fraud on the court (Tr. 11/15/89 pp. 13-47; P.A.119a).

In December 1989 the district judge rendered his Final Report finding that there had been no substantial interference with any tannery case because no such case ever existed. The district judge found that the nondisclosure of the report did *not* constitute substantial interference with the preparation of a tannery case

> where the essential predicate of such a case — use and disposal of the complaint chemicals by the defendant — was significantly negated by the evidence developed by the plaintiffs themselves in the course of pretrial investigation and discovery, and has never been otherwise established (P.A.88a).

As to any appropriate remedy, the trial judge was unequivocal that no new trial should be granted, stating:

> I have no uncertainty on this point . . . *In my opinion, a new trial on the issue of the pollution of wells G and H resulting from disposal of the complaint chemicals at the tannery site would be pointless, wasteful and unwarranted.*" (emphasis added) (P.A.88a-89a).

As to the claims of fraud on the court, misrepresentation, and other attacks on Beatrice and its counsel made by petitioners' motions relying on the late filed affidavits of October 1989, the trial judge recommended denial of these and all other pending motions (P.A.93a). The trial judge further found as a fact that, even with all the proffered and admitted testimony and evidence and all the so-called "new revelations"

asserted by petitioners, there was still no evidence of disposal of complaint chemicals (P.A.87a), and no "tannery case" to be interfered with (P.A.88a).

The trial judge also found that petitioners' counsel had known before trial and throughout the post-trial proceedings that there had been no disposal of complaint chemicals on the tannery site, but nonetheless continued to prosecute the claim (P.A.83a-84a). Accordingly, the trial judge found that Fed.R. Civ.P. 11 and 28 U.S.C. § 1927 had been violated by petitioners' continued pursuit of a tannery case where none existed (P.A.80a-83a) and by petitioners' misrepresentation that there was a basis in fact for the claim (P.A.91a-92a).

As the trial judge found, petitioners' own investigative file forcefully substantiated, if not compelled, that finding. That investigative file not only "contained no support whatsoever for the claim of disposal" but "significant positive evidence to the contrary" (P.A.82a). The court was emphatic in his finding that no tannery case ever existed, stating:

> "[S]o far as appears plaintiffs did not have even the benefit of rumor, whisper, or even an anonymous tip. *The entire exercise was apparently purely for forensic advantage*" (emphasis added) (P.A.92a n.5).

After receiving the trial judge's Final Report, the Court of Appeals invited and received briefs and argument solely directed to the final report and the trial judge's findings and recommendations (P.A.109a). Applying the proper standard of review the Court of Appeals affirmed the district judge's findings, recommendations and actions in all respects. The Court of Appeals noted that the district judge had tackled a "thankless . . . task with incisiveness and vigor" (P.A.108a) and rejected the petitioners' claims that the remand inquiry had not been thorough and aggressive or that there had been fraud on the court (P.A.112a n.3, 118a-119a).

The petitioners filed a petition for reconsideration by the Court of Appeals, arguing that the Court had not addressed the issue of fraud on the court. The Court of Appeals denied the petition, finding that it largely "rehashed" arguments already heard and rejected (P.A.121a). The Court also rejected petitioners' newly-raised claim that the Rule 11 sanction involved a denial of due process, and held that, in any event, such a late-asserted claim had been waived by the failure to raise it in petitioners' brief or argument (P.A.121a-122a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. This Fact Intensive Case Involving The Denial Of A Motion To Vacate Judgment Raises No Issues Of Public Importance Or Misapplication Of Any Federal Rule.

Despite its lengthy and complicated arguments, the petition presents no important issue of policy or principle, but reveals only a uniquely fact-intensive controversy inappropriate for further review. The decision sought to be reviewed involves the Court of Appeals' affirmance of the trial judge's denial of a motion to vacate judgment under circumstances demonstrating that petitioners had knowingly prosecuted a non-existent case. The Court of Appeals properly applied the correct standard of review and decided that the trial judge, who was most familiar with the case, did not abuse his discretion or commit an error of law in denying the motion to vacate. The Court of Appeals strongly stated that, as a result of the trial judge's expertise and intimate knowledge of the eight-year old case, as well as his having presided over a 78-day trial, a three-day new trial hearing in 1987, and a lengthy factual inquiry in 1989, he was in the best position to determine whether the nondisclosure of the report had substantially interfered with the preparation and presentation of the petitioners' claimed tannery case.

The decision affirming the district judge's denial of the motion turned entirely on the factual circumstances before the trial judge who had conducted the long evidentiary inquiry concerning the nondisclosure of the report (P.A.112a). That inquiry established that there was no interference with the petitioners' nonexistent case, and that the petitioners, far from being victims, had abused the system by bringing a case without any factual basis to substantiate the crucial element of disposal of the complaint chemicals (P.A.83a-84a;91a-92a).

Petitioners now complain that the district judge, in assessing the effect of nondisclosure of the report, should not have considered the fact that there was no disposal of complaint chemicals at the tannery site, and that the petitioners never had any tannery case. The Court of Appeals flatly rejected this contention as contrary to common sense and reality, holding that lack of disposal and the demonstrated nonexistence of the petitioners' tannery case were plainly relevant to the issue of interference, and a logical and appropriate factor to consider in determining whether to vacate the judgment (P.A.111a-112a).

Recognizing that, "[i]n a long, complicated, factbound case like this one, the trial judge has a unique coign of vantage" (P.A.112a) and that "[a]ppellate review of complex fact-dominated issues cannot be allowed to descend to the level of Monday-morning quarterbacking" (P.A.112a), the Court of Appeals declined to substitute its judgment for that of the trier of fact or to ignore "the reality of events" (P.A.111a-112a). The Court observed that even "armed with the report" the petitioners would not have had a tannery case (P.A.111a), and stated that the District Court "was correct in viewing its task as more than an exercise in theoretical abstraction and in considering the evidence on disposal" (P.A.112a). Finding that the trial judge's findings and recommendations were "satisfactorily rooted in the record and completely consistent with common sense" (P.A.111a), the Court of Appeals adopted his recommendation "as to the [non]effect" (P.A.112a) or the "lack of effect" of the nondisclosure of the report (P.A.119a).

Not only the rational application of Rule 60(b)(3) to the complex facts, but law, logic and common sense plainly indicated that the motion to vacate judgment was properly denied where the petitioners never had a case to begin with. The basic threshold question which any party seeking extraordinary relief under Rule 60(b) must demonstrate is the existence of a meritorious case. *See Square Construction Co.* v. *Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981). Here there was no such case, a factual reality which was substantiated by the jury, by the trial judge's ruling on the new trial motion, by the facts of the remand inquiry, by the subsequent findings, recommendations and Final Report of the trial judge (P.A.72a-104a) and by the affirmance of the Court of Appeals (P.A.105a-120a).

Although the facts of the case may have been unusual, the findings and rulings of the district judge and the decision of the Court of Appeals were not. The only issue before the Court of Appeals was a review of the trial judge's discretion under familiar and appropriate standards which were deferential to his knowledge and expertise in the case. The trial judge's factual determinations and his exercise of discretion were upheld by the Court of Appeals, which found his findings "sound, well substantiated and free from observable legal error" (P.A.112a).

The Petition represents nothing more than the petitioners' dissatisfaction with the facts clearly and consistently found against them by two courts below and raises no error or issue worthy of review. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

II. The Petitioners Have Misstated Facts And Distorted The Record In An Effort To Create Issues For Review Which Do Not Exist.

The petitioners repeatedly misstate and mischaracterize the record in an attempt to obscure the fact that their position presents no reviewable issue but only quarrels with the factual

findings of the judge and jury and the exercise of the district judge's discretion. Pursuant to Supreme Court Rule 15.1, Beatrice is obliged to point out the "misstatements of fact or law" by which petitioners attempt to create non-existent issues and which represent a continuation of the improper practices culminating in the Rule 11 violation found by the district judge.[1]

Among the more egregious examples are the petitioners' untrue assertions in various forms that tannery waste had been found on, or secretly removed from the 15 acres (Pet. 4, 8, 19). This obvious attempt to ignore or contradict already adjudicated facts is refuted by the record and by the trial judge's specific findings (P.A.51a;83a-84a). The petitioners' misstatement that the tannery used the 15 acres as a dumpsite (Pet. 27) or that "chemical waste" from the tannery was found at the bottom of the hill on the 15 acres flies in the face of the district judge's explicit finding that the material did *not* come from the tannery and was *not* tannery waste (P.A.50a-52a). The trial judge three times rejected the claim (or as the district court ultimately labelled it, the petitioners' "obsession" (Tr. 7/26/89 p.23)) that tannery waste had been found, or disposed of, on the 15 acres (P.A.49a-52a;82a-87a). Moreover, there was no "secret removal" of "chemical waste" as petitioners claim, but on the contrary, the trial judge found that the material removed by Riley was *not* tannery waste (P.A.51a), that the activity was carried out with heavy equipment in broad daylight with EPA officials present on the property, (P.A.50a) and that none of the "removal activities" provided any evidence of disposal of complaint chemicals (P.A.52a).

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[1] Petitioners' disregard for court rules continues in this Court where their brief uses 10 point type when Supreme Court Rule 33(b) requires 11 point and specifically prohibits any attempt "to reduce or condense the typeface in a manner that would increase the content of a document". In the Court of Appeals the petitioners also evaded the page limits on their brief by passing off as an appendix certain material which belonged in the text of the brief. The Court of Appeals found this practice "improper" stating that "[c]ounsel should have known that this was not the proper procedure" (R.A. 9).

Similarly, the petitioners' reckless accusations against Beatrice of fraud, conspiracy, concealment, destruction of evidence, false testimony and other unethical conduct are totally contradicted by the record, the trial judge's findings and rulings and by the Court of Appeals affirmance. The record shows that these accusations have been consistently rejected throughout the remand proceedings. In his 1988 decision denying the motion to vacate, the trial judge rejected as "unsubstantiated" the petitioners' accusations of conspiracy (P.A. 64a). In July 1989, after the "misconduct" phase of the remand inquiry, the trial judge explicitly found that Beatrice's attorneys had not concealed any evidence (P.A.49a) and that there was no fraud (P.A.46a,49a,119a). The trial judge fully credited the testimony of Beatrice's counsel about their contacts with the report (P.A.48a-49a). He found Beatrice's chief trial counsel to be a lawyer of national reputation and a "tough but meticulously ethical advocate" (P.A. 48a). Notwithstanding the specious accusations of the Petition (Pet. 29), there was not the slightest evidence or suggestion that Beatrice's counsel had "open contempt" for their obligations to the Court or that there had been any improper, untrue or inaccurate testimony. Moreover, in the course of denying other motions by petitioners seeking the disqualification of Beatrice's counsel, the trial judge found that Beatrice's counsel had not demonstrated any tendency "to protect themselves improperly" (P.A.97a-98a) and had performed their obligations to the court (P.A.99a).

Not only were the accusations of fraud and fraud on the court constantly made and refuted throughout the "misconduct" phase of the remand inquiry, but these irresponsible charges continued during the "interference" phase as well. In October 1989 these charges were renewed in a new barrage of motions based on the late filed affidavits of Rileyco's counsel who sought reconsideration of the "deliberate misconduct" finding. (See pp. 8-9 *supra*). The district judge denied the reconsideration motion (P.A.101a-104a), but the petitioners

nonetheless seized the occasion to make further unsubstantiated accusations of fraud, misrepresentation and misconduct against Beatrice and its counsel, and to move for disqualification and broad sanctions including a general default (P.A. 91a).

The petitioners' new motions were met with a lengthy, detailed opposition from Beatrice accompanied by extensive counter-affidavits (P.A.177a-192a). The issues raised by petitioners' accusations were fully briefed and argued and the district judge gave full consideration to the motions, the opposition and all affidavits (Tr. 11/15/89 p. 51). In his Final Report, the district judge recommended denial of these motions (P.A.93a), thus completely rejecting the petitioners' charges of fraud in all its varied forms.

The denial of these motions was fully approved by the Court of Appeals which affirmed the actions of the district judge and adopted his recommendations. The Court of Appeals specifically noted that it had considered "each and all" of the petitioners objections, that it had reviewed all of the district judge's rulings on motions and evidence which "drew petitioners' fire" in their brief and found no reversible error (P.A. 119a and fn.8). Thus, the petitioners' present claim that neither the District Court nor the Court of Appeals considered their accusations and objections charging fraud on the court is plainly untrue and contradicted by the record.

The petitioners' assertion that the district judge had not sufficiently investigated their objections and "revelations" and had not conducted a thorough and aggressive inquiry is also a clear distortion of the record. The Court of Appeals found exactly to the contrary and dismissed this assertion, flatly stating that "the record so emphatically refutes the allegation that substantive comment ... would be supererogatory" (P.A. 112a n.3). As the Court of Appeals observed: "It is crystal clear that the district court read our opinion carefully, followed our instructions closely, and faithfully applied the principles which we elucidated" (P.A.109a).

The petitioners further distort the record by the egregious misstatement that the remand inquiry had been "found" to be the subject of fraud or "fraudulent concealment" (Pet. 28). There was no such finding and the trial judge's Final Report clearly shows the contrary, including the rejection of petitioners' motions making such accusations. Moreover, the Court of Appeals not only affirmed the trial judge's rulings but specifically rejected petitioners' accusations of fraud on the court stating that it found "the plaintiffs' hyperbole unconvincing" (P.A.112a).

Petitioners also offer the distorted argument that the conclusion by the Court of Appeals that no evidence existed on disposal of complaint chemicals was inconsistent with its earlier comments in *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910 (1988) *(Anderson I)* and was based on an incomplete record. The contention ignores the crucial fact that the long remand inquiry and the Final Report of the trial judge came after the *Anderson I* opinion. That evidentiary inquiry, and the trial judge's detailed report which followed, provided full and complete findings and recommendations unequivocally demonstrating that petitioners had no evidence of disposal and that their own files admitted no such evidence existed. Not only was the record complete on this issue, it was overwhelming, and the Court of Appeals concluded that any contrary finding would be based on conjecture or surmise (P.A.111a).

The petitioners also claim that they were harmed because they did not receive the benefit of "adverse inferences" based on the nondisclosure of the report (Pet. 19). The record shows the contrary. The petitioners received more than an adverse inference. They received a presumption of substantial interference rebuttable only by clear and convincing evidence. However, the trial, the remand inquiry and their own investigative file demonstrated, by clear and convincing evidence, that they had no basis for asserting a tannery claim and had violated Rule 11 in doing so.

No amount of rhetoric or misstatement can obscure the fact that the only legal issue presented to the Court of Appeals in this fact-bound case was whether the district judge abused his discretion in denying the motion to vacate and recommending sanctions. The Court of Appeals clearly found no abuse of discretion in any of the district judge's findings, rulings or recommendations. Petitioners' attempts to disregard this reality and to create non-existent issues by misstating and distorting facts repeatedly found against them is irresponsible advocacy directly contradicted by the record. *Cf. In Re Ginther*, 791 F.2d 1151 (5th Cir. 1986) (denial of Rule 60(b)(3) motion containing baseless claims of fraud and imposition of Rule 11 sanctions held not an abuse of discretion, and appeal held frivolous).[2]

III. The Decision Below Does Not Conflict With Other Circuits But Is A Traditional And Routine Application Of Familiar Principles Affirming The Trial Judge's Expertise And Discretion.

Neither the 1988 decision in *Anderson I* nor the decision below conflicts with the decisions of any other circuit, and no court or commentator has suggested otherwise. Indeed, *Anderson I* followed the same basic principles and considerations as other Circuits, and the decisions which petitioners cite as supposedly in conflict with the First Circuit (Pet. 15-16) were all cited in *Anderson I* as "guideposts" for determining when to set aside a judgment (P.A.25a). Each of these cases applied essentially the same principles as those enunciated by the First Circuit and each would have reached the same result as the decision below if presented with the facts found by the district judge. Furthermore, petitioners' contention that the

[2] As petitioners have indicated (Pet. 14), following the affirmance below, another suit was brought in the state court claiming there had been fraud and fraud on the court in the federal action. The state court dismissed the suit on the grounds of collateral estoppel holding that the claims had been fully and fairly heard in federal court.

First Circuit decision below conflicts with its own earlier directions to the trial judge in *Anderson I* (Pet. 18) is not only irrelevant but is refuted by a comparison of the two opinions, both of which were rendered by the same panel.

Petitioners argue that the language in *Anderson I* that the misconduct must "substantially interfere" with the full and fair presentation of the moving party's case is somehow more detrimental to them than the semantic formulation in other Circuits that the misconduct must "prevent" the moving party from "fully and fairly presenting" the case (see cases cited at (P.A.25a). The assertion has no basis in law or fact. Although the Court of Appeals added the "refinement" of "substantial" interference in order to "delineate more exactly" the method of weighing the value of the nondisclosed material (P.A.26a), no difference exists between the First Circuit and other circuits as to the basic process, policy or rationale regarding Rule 60(b)(3) determinations or the task of the trial judge in deciding such fact-intensive matters.

The language of "substantial interference" represents no more than a differently worded articulation of the basic premise, express or implied in every Rule 60(b)(3) decision, that no judgment will be vacated where the claimed misconduct does not substantially prejudice the moving party's rights (P.A.25a-26a).[3] This was made clear in *Anderson I* by the Court's reliance on Fed.R.Civ.P. 61 (P.A.26a) which prohibits vacating judgments unless refusal to do so is "inconsistent with substantial justice", and requires that courts disregard errors or defects which do not affect substantial rights. Accordingly,

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[3] *Anderson I* also offered other articulations of the same principle, including whether the nondisclosure "impeded plaintiffs from targeting the tannery as a source of contamination and fully and fairly preparing their case *in that respect*," "foreclosed full and fair preparation or presentation" (P.A.39a-40a,25a) and whether petitioners had been "deprived of any fair chance to develop" their tannery case (P.A.41a). Other circuits have also articulated similar formulations. *Carson* v. *Polley*, 689 F.2d 562, 585 (5th Cir. 1982) (documents must be "vital" to the case and nondisclosure must prejudice plaintiff); *Scutieri* v. *Paige*, 808 F.2d 785, 794 (11th Cir. 1987) (misconduct must be "tantamount to preventing" a full and fair presentation).

all Circuits agree not only that a motion to vacate a judgment under Rule 60(b)(3) is directed to the sound discretion of the trial judge, but that in each case, a determination must be made on all the facts and circumstances whether there has been substantial prejudice to the moving party's case. *See e.g, E.F. Hutton & Co.* v. *Berns*, 757 F.2d 215, 217 (8th Cir. 1985) (no prejudice caused by misleading statements); see also *Carson* v. *Polley*, 689 F.2d 562, 585-586 (5th Cir. 1982) (non-disclosure did not entitle petitioner to new trial where there was "no possibility of substantial prejudice" shown); *West* v. *Love*, 776 F.2d 170, 176 (7th Cir. 1985) (no prejudice from threat to kill witness).

Pursuant to this basic principle, the Courts of Appeal, in reviewing Rule 60(b)(3) decisions, always consider the impact of the nondisclosed material in the context of an existing viable case. Indeed in every Rule 60(b) decision, the threshold issue presented is whether the moving party has demonstrated the existence of a meritorious case or defense. *See Square Construction Co.* v. *Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71-72 (4th Cir. 1981). Neither the First Circuit nor any other circuit would automatically vacate a judgment where the nondisclosure was insubstantial, irrelevant or of no effect. *See Anderson I* ("not every instance of nondisclosure merits the same judicial response" or requires a new trial (P.A.24a-25a), and "there is not always a need to ditch the baby with the bath water" (P.A.26a)). *Cf. Simons* v. *Gorsuch*, 715 F.2d 1248, 1253 (7th Cir. 1983) (motion to vacate denied where alleged misrepresentations were irrelevant to the legal issues). *A fortiori*, no judgment would be vacated where the moving party had no case to begin with. *See Bunch* v. *United States*, 680 F.2d 1271, 1282-83 (9th Cir. 1982) (no substantial rights affected where plaintiff had no evidence of age discrimination); *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972) (relief denied where plaintiff never had trade secret to be misappropriated). Even more clearly, no judgment would be vacated where the plaintiff had

knowingly prosecuted a nonexistent case "purely for forensic advantage" (P.A.92a).

Neither the district judge nor the Court of Appeals adopted any new standard or any erroneous interpretation or application of Rule 60(b)(3). Whether the semantic formula is articulated as "substantial interference" or as "preventing a party from fully and fairly presenting its case," the result under Rule 60(b)(3) remains the same. Nondisclosure which does not prevent a petitioner from "fully and fairly presenting" a case would not "substantially interfere" with that case. *Cf. Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. ____, 110 L.Ed. 2d 359, 378 (1990) (Courts of Appeal use "different verbal formulas" to describe essentially same standard of review of Rule 11 violations). In either case there has been no substantial prejudice which would justify vacating a judgment. Thus, the First Circuit's affirmance of the district judge's discretion under Rule 60(b)(3) was wholly consistent with the decisions of other Circuits and presents no issue for review by this Court.

IV. There Was No Error Or Lack Of Due Process In The Finding That Prosecuting And Maintaining A Nonexistent Case Was A Rule 11 Violation, And The Recommended Sanctions Were Well Within The Trial Judge's Discretion.

The district judge found a Rule 11 violation because the petitioners had misrepresented the existence of a tannery case and had knowingly prosecuted and maintained that nonexistent claim without any basis for doing so — not even a "rumor, whisper or . . . anonymous tip" (P.A.92a n.5). That finding was well supported by the facts and based on the trial judge's broad experience in this eight year-old case, his knowledge of the pretrial discovery, his familiarity with the evidence at trial and his presiding over the remand inquiry. In particular, he was fully aware that the petitioners' in-

vestigative files were not only devoid of any evidence of disposal of complaint chemicals but revealed affirmative statements that no such evidence existed, including the comment that the complaint chemicals "do not belong in the leather industry" (P.A.82a). Thus, despite petitioners' present protestations, there was nothing unfounded, unwarranted or inequitable about the trial judge's finding that Rule 11 had been violated by petitioners' prosecuting a nonexistent claim. On appeal, the Court of Appeals found no error or abuse of discretion and that decision raises no issue warranting review by this Court.[4]

The trial judge also made recommendations to the Court of Appeals as to appropriate sanctions. Having found that each party's conduct was sanctionable, the trial judge weighed all the facts and circumstances and concluded that, in the "convoluted context of this case," neither party should benefit through sanctions from the delinquency of the other, "and that should be the sanction for both of them" (P.A.92a-93a). As the Court of Appeals noted, the trial judge thus sanctioned each party with the expense and inconvenience caused by the other's conduct (P.A.91a-93a, 117a-118a). The Court of Appeals recognized that the trial judge had considered the dual purposes of deterrence and compensation, and held that his selection of sanctions was not only within his discretion, but in keeping with the language, purpose and intent of Rule 11 which requires only an "appropriate" sanction (P.A.118a). Expressing deference to the expertise of the trial judge in the area of sanctions, the Court of Appeals properly applied an

[4] The petitioners now argue, for the first time, that the investigative file (which was taken *in camera* for petitioners benefit) should have been used more extensively and interpreted differently by the district court (Pet. 27). In addition to the blatant impropriety evidenced by petitioners' making arguments never raised below based on documents never seen by Beatrice, this is another improper attempt to disregard the district judge's findings. Moreover, this Court should not make findings of fact *de novo*, or decide issues not argued or presented to the District Court or the Court of Appeals. *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. ____, 106 L.Ed. 2d 219, 239 (1989).

"abuse of discretion" standard, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. ____, 110 L.Ed. 2d 359 (June 1990), and found no error or abuse of discretion in the trial judge's "balancing the scales" (P.A.115a).

The Court of Appeals observed that trial judges "live in the trenches" and are "steeped in the facts and sensitive to the interplay amongst the protagonists" (P.A.114a). Here, because of his knowledge, expertise and experience, the trial judge was in the best position to evaluate the parties' conduct and to fashion appropriate sanctions. As the Court of Appeals stated, he "weighed all proper and no improper factors in dealing with sanctions" (P.A.115a), and his factually grounded determinations were "satisfactorily rooted in the record and completely consistent with common sense" (P.A.111a). Accordingly, nothing in the trial judge's exercise of discretion or the Court of Appeals review of the sanctions recommended raises any issue meriting review by this Court.

The Court of Appeals also noted there was no merit in the petitioners' argument that Beatrice was not sanctioned (P.A. 117a-118a). In fact, as the record showed, Beatrice was obliged not only to defend against burdensome and expensive proceedings which never should have been prosecuted but to bear the substantial expense of the court-appointed expert (P.A.100a). Similarly, there is no merit in the petitioners' rhetoric that they were sanctioned for pursuing their alleged tannery case or discovery remedies (Pet. 24). The record clearly shows that they were sanctioned for knowingly pursuing a nonexistent case (P.A.91a-92a).

Petitioners' claim of an alleged lack of due process with respect to Rule 11 sanctions also has no basis in fact or law. The trial judge's recommendation for Rule 11 sanctions for prosecuting and maintaining a nonexistent case met with vigorous opposition from the petitioners and was fully briefed and argued before the Court of Appeals. After considering the arguments and briefs, the Court of Appeals accepted the trial judge's recommendation as a proper exercise of his discretion and imposed the Rule 11 sanction.

As the Court of Appeals stated, there was no lack of hearing and no lack of due process. The Court of Appeals properly pointed out that the trial judge had only recommended, not imposed, sanctions (P.A.122a). Petitioners were fully aware of the trial judge's recommendation and had every opportunity to move for reconsideration (which they did not do) and to brief and argue the sanction issues to the Court of Appeals (which they did most vigorously). There was no surprise or inequity in the imposition of the Rule 11 sanction. Petitioners cannot now be heard to claim a lack of due process merely because the decision is not to their liking.

The Court of Appeals also found that any claim of lack of due process had clearly been waived by the petitioners' failure to raise that issue until after the court had ruled. This conclusion, which again followed traditional principles, was clearly correct, and involves no significant issue requiring review by this Court. Waiver of a right to argue a matter not raised below is a recognized result in all circuits and in this Court. See e.g. *Beaulieu* v. *United States Revenue Service*, 865 F.2d 1351, 1352 (1st Cir. 1989); *Browning Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. ____, 106 L.Ed. 2d 219, 239 (1989).

Finally, petitioners' prolix arguments about the effect of the Court of Appeals decision allegedly creating bad policy or precedent by facilitating discovery abuse is pure rhetoric and wholesale speculation. The fact pattern of this complex case is not likely to recur and affords no precedent or incentive either for permitting discovery abuse or for encouraging Rule 11 violations. The case merely presents factual determinations made by the district judge under Rule 60(b)(3) and reviewed for error or abuse of discretion by the Court of Appeals. Despite the rhetoric of the Petition, this convoluted case remains one peculiarly limited to its facts, and rightly decided by the jury, the trial judge and the Court of Appeals.

CONCLUSION

Petitioners have had an extremely full and fair day in court including a long trial, a lengthy remand inquiry and two arguments before the Court of Appeals. Every stage of the proceedings has demonstrated the total nonexistence of the petitioners' case. Nonetheless, petitioners have consistently refused to accept facts found against them and have insisted that the jury, the trial judge and the Court of Appeals all are in error, and that the facts of the case must continually be retried, reargued and re-reviewed. The record and the decisions below plainly demonstrate otherwise. This Court should not accord this fact-bound controversy any further review and the Petition for a Writ of Certiorari should be denied.

Beatrice Foods Co.
By Its Attorneys,

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Dated: AUGUST 27, 1990

APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1672-S

ANNE ANDERSON, ET AL.,
PLAINTIFFS,

v.

W. R. GRACE & CO., ET AL.,
DEFENDANTS.

MEMORANDUM AND ORDER ON DEFENDANT BEATRICE FOOD CO.'S MOTION FOR IMMEDIATE ENTRY OF FINAL JUDGMENT UNDER RULE 54(b)

September 17, 1986

SKINNER, D.J.

Plaintiffs filed this suit in 1982 to recover damages from defendants W. R. Grace & Co. ("Grace") and Beatrice Food Co. ("Beatrice"). Plaintiffs alleged that Grace and Beatrice had negligently disposed of carcinogenic chemicals on their properties, that those chemicals had seeped into two wells, Wells G and H, from which the city of Woburn drew its water, and that as a result of using water from the contaminated wells, plaintiffs and plaintiffs' decedents had contracted various diseases, including leukemia. Because of the complexity of the issues and the evidence, I ordered trial to proceed in three phases. Phase I would concern whether either defendant had acted negligently and whether any such negligence had contributed substantially to the contamination of Wells G and H. In Phase II the issue would be whether that contamination

had caused certain plaintiffs to contract leukemia, and if so, what damages they had suffered. Phase III would deal with whether the contamination had damaged certain plaintiffs' immune systems, and if so, what damages they had suffered. From the beginning of the trial I made clear that Phase I was the foundation for the other phases of the trial; if the plaintiffs failed to establish their case in Phase I, the trial would end.

Phase I of the trial began on March 10, 1986. On July 15, after 78 days of hearings and testimony, I gave the jury its instructions and submitted to it four special interrogatories regarding each defendant. Plaintiffs did not object to any of the submitted interrogatories. Interrogatory No. 1 as to Beatrice read:

> 1. Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Beatrice site after August 27, 1968 *and* substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22, 1979?
>
> | | | |
> |---|---|---|
> | (a) Trichloroethylene | Yes____ | No____ |
> | (b) Tetrachloroethylene | Yes____ | No____ |
> | (c) 1,2 Transdichloroethylene | Yes____ | No____ |
> | (d) 1,1,1 Trichloroethylene | Yes____ | No____ |
>
> If you have answered "No" to all these chemicals, you need not proceed further.

The jury answered "No" as to each of the chemicals and did not answer the remaining interrogatories.

The defendant Beatrice Foods has moved for immediate entry of judgment under Fed.R.Civ.P. 54(b) on the ground that the jury's negative answer to question 1 is dispositive. Plaintiffs argue that the answer is not dispositive and the wrong question was addressed to the jury. It may be theoretically arguable that substantial contribution to the contamina-

tion of wells is not the same as substantial contribution to the illness of the plaintiffs. This argument is not open to the plaintiffs on the record in this case. The jury's answer foreclosed recovery by the plaintiffs against Beatrice Foods.

I. *Timeliness of Plaintiffs' Objections*

Plaintiffs now argue for the first time that Interrogatory No. 1 does not dispose of their claim against Beatrice. They contend that, at least theoretically, the jury's finding that Beatrice did not substantially contribute to the contamination of Wells G and H does not preclude a later finding that Beatrice was a substantial factor in causing plaintiffs' injuries. I rule that plaintiffs' failure to object to Interrogatory No. 1 when I submitted it to the jury bars them from challenging the substance of the interrogatory at this late date.

The courts have made it crystal clear that parties must object to a special interrogatory before the jury retires for deliberation. *See Pielet* v. *Pielet*, 686 F.2d 1210, 1217 (7th Cir. 1982), *cert. denied*, 459 U.S. 107, 103 S.Ct. 733 (1983); *Central Progressive Bank* v. *Fireman's Fund Ins. Co.*, 658 F.2d 377, 381 (5th Cir. 1981); *Cote* v. *Estate of Butler*, 518 F.2d 157, 160 (2nd Cir. 1975); *Kirkendoll* v. *Neustrom*, 379 F.2d 694, 698 (10th Cir. 1967); *R. H. Baker & Co.* v. *Smith-Blair, Inc.*, 331 F.2d 506, 510 (9th Cir. 1964). Failure to raise an objection at that time precludes a later attack on the interrogatory, whether in a motion for a new trial, *see Central Progressive Bank*, 658 F.2d at 381, or on appeal. *See Pielet*, 686 F.2d at 1217.

Plaintiffs had numerous opportunities to make timely objection to the "substantial contribution" language in Interrogatory No. 1 which they now find inadequate. They did not do so. I conducted two days of conferences with the parties seeking their assistance in drafting the special interrogatories. The record reveals that the "substantial contribution" standard was mentioned at least 23 times during those conferences, and not once did plaintiffs object to the language or

suggest that the interrogatory would not have the intended dispositive effect. After I gave the jury its instructions and submitted the special interrogatories to them, I asked counsel for objections. Plaintiffs stated several objections to the jury instructions but did not mention Interrogatory No. 1, nor did they object to that part of the instructions which indicated that a negative answer to question 1 would terminate the case. Plaintiffs did not object to Interrogatory No. 1 when the jury came back with its negative answers. Despite these repeated opportunities to express their dissatisfaction with Interrogatory No. 1, plaintiffs did nothing to put the court on notice of their objections until they submitted the present memorandum.

Plaintiffs' original submission of alternative interrogatories did not contain the "substantial contribution" language used in the final interrogatory. This does not constitute an objection for purposes of Rule 49(a). The submission of relevant alternative questions absent a specific objection before interrogatories are submitted to the jury does not preserve a party's objection. *See Cote*, 518 F.2d at 160. In this case, plaintiffs' counsel worked extensively with me and defense counsel on revised interrogatories and in fact employed the substantial contribution language in their own proposals in conference. Nothing said in these conferences served to put the court on notice of the theory now advanced by the plaintiffs.

It was clear from the first day of trial that if plaintiffs failed to get the appropriate answer to the Phase I questions, their case would not proceed to the next phase. In my opening statement to the jury, I outlined this approach:

> The first part of the case will deal with the plaintiff's evidence which tends to show or [sic] designed to show . . . that first the toxic materials were on the lands of the defendants, that it migrated, that it got into the water in sufficient quantity to constitute a potential hazard. . . . When the evidence on those issues is presented . . . you

> will be asked to make a decision as to whether the plaintiff has established all of these elements by a preponderance of the evidence. If the answer is negative, that's the end of the case.

Tr. at 1-23, 1-25. I made the same point in pretrial conferences. *See, e.g.*, Tr., *First Day of Pretrial Conference* at 27. ("... whether we have a case left [after Phase I] depends upon [the jury's] answers.") Most important, Interrogatory No. 1 instructed the jurors not to answer any other questions if they answered "no" to that interrogatory. Thus the interrogatory itself made clear its intended dispositive effect. The same point was made in instructions to the jury, without objection. Tr. 78-30

Accepting plaintiffs' newly proposed theory now, fully a month and a half after the jury returned its verdicts, would be fundamentally unfair to Beatrice, whose lawyers have packed up their files and withdrawn from combat in reliance upon the accepted ground rules of the trial. I see no reason to alter the general rule that objections to special interrogatories must be made when they are submitted to the jury. There is no basis for asking the jurors any additional or amended questions.

Further reference to Rule 49(a) leads to the same result. The plaintiffs argue that a pertinent issue of fact was omitted from the interrogatories to the jury, namely, whether *any* of the contaminating chemicals from the Beatrice site reached the wells. The rule provides that the parties waive jury trial as to such omitted issue unless before the jury retires they demand such submission to the jury. I believe the rule to apply even where the trial is bifurcated and subsequent submissions may be made to the same jury. If that be true, then under the rule the court may make a finding on the omitted issue of fact.

I find that it has not been established by a preponderance of the evidence that any contaminant from the Beatrice site reached the wells. Dr. Pinder's tetimony was seriously flawed in this respect by his failure to account for loss of water from

the river during pumping. I accept Dr. Guswa's testimony that the gradient differentials were too insubstantial to form the basis of an opinion. Under the rules placing the burden of proof on the plaintiffs, I am obliged to find against the plaintiffs on this point.

II. *The Other Branch of Interrogatory 1*

Plaintiffs say nothing about the other branch of interrogatory 1 as to which the jury's negative answer may equally apply. With the benefit of hindsight, it is clear that it would have been better to separate the two branches of the question into two interrogatories. They were combined at the suggestion of plaintiffs' counsel. The answer may be read as concluding that the plaintiffs failed to prove that the offending chemicals were placed on the Beatrice site prior to the closing of the wells on May 22, 1979. The only evidence on this point was the uncorroborated "expert" testimony of Mr. Dobrinsky, a geologist. If the jury did not accept his opinion, there was no other basis for answering this question affirmatively.

Because of the unfortunate form of the question, it is impossible to know whether the jury's negative response applies to the first or second part of the question or to both. It is not necessary to resolve this question, however, because I am now convinced that Dobrinsky's opinion was improperly admitted, and Beatrice was entitled to a directed verdict.

I originally admitted Dobrinsky's testimony very reluctantly because I could see no foundation for this opinion that the offending chemicals had been poured into the ground at the Beatrice site prior to May of 1979, specifically in the sixties and early seventies. He had found several piles of debris containing artifacts which could be identified with that period. There was no association between the chemicals which were in the ground and the debris piles except proximity. After considerable colloquy with counsel, I admitted the testimony on the witness' representation that the whole character of the area supported his expert opinion and because I was concerned with the admonition of the Court of Appeals that the trial

judge's assessment of credibility should not enter into exclusionary rulings. *Bowden* v. *McKenna*, 600 F.2d 286 (1979).

Since that time, two things have occurred to make me change my mind. First, I now believe that the Court of Appeals' ruling in *Bowden*, which dealt with the observations of a lay witness, was not intended to alter the traditional obligation of the judge to assess the purported foundation of an expert witness' testimony. Second, I accompanied the jury on a view of the premises. It was clear that there was nothing about the site which made it more probable that the chemicals were dumped before 1979 than after, any time up to the point when the EPA required partial fencing of the property in the early 1980's. Early aerial photographs showed empty barrels on the site in quantity but there was no evidence as to what, if anything, was in them. Accordingly, even if the jury had answered question 1 affirmatively, I would have been obliged to grant a motion for judgment for the defendant notwithstanding the verdict, as I indicated to counsel at one point in the trial.

In summary, on the evidence in this case, the plaintiffs cannot recover against Beatrice Foods.

The jury's answer to interrogatory 1 is determinative of this case by itself, and warrants the entry of final judgment for Beatrice. Conceivably, however, in the exercise of discretion, I could permit the submission of an additional question to the jury. In my opinion, this would be fundamentally unfair at this point in the trial, and in any case, the failure of plaintiffs' evidence in other aspects mandates the same result, namely, entry of final judgment for the defendant Beatrice Foods.

ORDER

I find that there is no just reason for delay and order that final judgment for Beatrice Foods be entered forthwith pursuant to Fed.R.Civ.P. 54(b), with costs.

s/ WALTER JAY SKINNER
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1672-S

ANNE ANDERSON, ET AL.,
PLAINTIFFS,

v.

CRYOVAC, INC., ET AL.,
DEFENDANTS.

JUDGMENT
Rule 54(b)

SKINNER, J.

Judgment is hereby entered for the defendant Beatrice Foods Co. with costs.

By the Court

s/ PHILIP LYONS
PHILIP LYONS
Deputy Clerk

Dated: October 2, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1070

ANNE ANDERSON, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

BEATRICE FOODS, CO., ET AL.,
DEFENDANTS, APPELLEES.

ORDER OF COURT

Entered: January 30, 1990

The procedure followed by appellants in filing their brief is improper. Counsel should have known that this was not the proper procedure. Since the date for argument is next week, the Court will accept appellants' brief.

The appellees, may if they wish, file a supplemental brief not to exceed eight pages by Friday, February 2, 1990.

By the Court:

FRANCIS P. SCIGLIANO
Clerk